REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO.55 OF 1992

1. MADHAVJI HARJI JETHWA

2. RAJNIKANT MADHAVJI JETHWA

3. PARESH MADHAVJI JETHWA……..……..APPELLANTS

=V E R S U S=

ATLANTIC ENGINEERING &

PLUMBING WORKS LIMITED…….DEFENDANTS

J U D G M E N T

There are 6 appeals listed as Nos. 55 to 60 of 1992 which emanate from six Mombasa District Magistrates Court Cases Nos. 881 to 886 of 1992 respectively. The suits were filed by three Landlords against the various tenants who occupy Workshops developed by them on Plot No. Mombasa Block/XIX/206 on Likoni Road. Henceforth the Plaintiffs in that court who are the Appellants before this court will be referred to as the "Landlords" while the Respondents will be referred to as the "tenants". The Lower Court cases were consolidated while by an order of this court made on 28.11.94, Appeal Nos.56 to 60 of 1992 were also consolidated. Appeal No. 55/92 was disposed of by consent of the parties recorded on 25.10.94.

The Appeals arose from the Ruling of the District Magistrate, E. Areba, dated 6.7.1992 dismissing the Landlords' application for summary judgment under O.35 r.1 of the Civil Procedure Rules. The Landlords had by Notice of Motion dated 30.5.92 sought one substantive order that :

"Judgment be entered and Declaration be made as prayed in the Plaint".

And the prayers made in the Plaint were:-

1. A Declaration that the Defendants do pay to the Plaintiffs rental at the rate of shs.3,500/ - every month in respect of the said front workshop premises with effect from 1 st February, 1992 .

2. Judgment for :-

(a) Shs.7416/ - being balance of arrears of rent for the months of February – May, 1992, inclusive for the said front workshop premises.

(b) Interest calculated monthly at Cour t Rates on the said balance of arrears of rent

from the due date of payment thereof by the Defendants to the Plaintiffs.

(c) Costs of the suit and incidental thereto and interest thereon at 14% per annum, and

(d) Such further or other relief".

Only the amounts stated varied from tenant to tenant but they were all within the pecuniary jurisdiction of the District Magistrate's Court.

The basis for seeking such prayers was that the Landlords had on 28.11.91 served notices on each tenant altering the terms of tenancy by revising the rents upwards with effect from 1.2.92. The tenants did not respond to such notices as by law required and the Notices therefore took effect. Hence the application for summary judgment. The plaints were filed in May 1992. In their statements of defence filed in June 1992 the tenants did not deny, and indeed admitted expressly, that the Landlords owned the premises, the existing rents paid were correctly stated, the Notices were validly served altering the terms with effect from 1.2.92, and that they did not respond to the Notices under s.6 of Cap.301. They averred however, that they had applied to the Tribunal for extension of time to challenge the rental increments and that the application was still pending hearing before the Tribunal. Those were the same facts adumbrated before the Learned District Magistrate where it was contended that the determination of the Landlords' application for summary judgment would render the tenants' application before the Tribunal nugatory and time was sought to dispose of that application. The Landlords would not hear of it but they were overruled by the Trial Magistrate who held that the application before the Tribunal should be heard first. He also held that he had no jurisdiction to issue declaratory orders and that it was for the Tribunal to determine the rent payable on the premises.

From those findings, Learned Counsel for the Landlords Mr. Suchak framed 8 grounds of Appeal, paraphrased:

The Trial Magistrate erred in-

1) Failing to enter judgment and make a declaration.

2) Holding that there was a triable issue.

3) Finding that the mere filing of an application by the tenants for extension of time justified refusal to enter judgment.

4) Failing to find that the Landlords' Notice took effect when it was not challenged.

5) Drawing conclusions adverse to the Landlords.

6) Considering irrelevant matters and omitting relevant ones.

7) Relying on matters on which there was no evidence.

8) Awarding costs of the application to the tenants.

In arguing those grounds Mr. Suchak did not refer to them specifically but merely stressed that the application should not have been dismissed since the averments in the Plaint relating to the Notice and its taking effect had been admitted and there was no defence to the action. The right order therefore would have been a conditional leave to defend. The fact of the matter, he stressed, was that there was no reference filed before the Tribunal and therefore none could be urged as a defence to the action of the Landlords.

The Tribunal could not have jurisdiction where no reference was in existence. He went further and disputed the filing of any application seeking extension of time to file a reference. For support of his

submissions he cited the Court of Appeal decision in **Kanabar v. Fish & Meat Ltd., C.A. 267/96.**

His only concession was the finding by the Trial Magistrate that he could not issue declaratory orders that were sought in the application.

For the tenants, learned counsel Mr. Gikandi submitted that all the Trial Magistrate did was to exercise his discretion as required by law under O.35 Civil Procedure Rules and he granted unconditional leave to defend when he found that there were triable issues. Mr. Gikandi refuted the contention that there was no application filed before the Tribunal and asserted that he had filed one on 2/6/92 although it was not served on the Respondents counsel until November 1992. The reason was because after the filing in Mombasa it had to be transmitted to Nairobi for processing. But he stated the fact of filing under oath and it was a live issue when the application came up for hearing.

Mr. Gikandi further submitted that the Notice could not have taken effect, even if no challenge was made, until an order was obtained from the Tribunal to that effect and served on the tenants before execution. No authority or section of the law was cited however for that profound submission of law.

I have considered all the issues raised and it seems to me that it is common ground, and therefore needs no belabouring, that valid notices were issued by the Landlord under S.4 Cap.301 and there was neither notification nor reference filed by the tenants under S.6 of the Act. Ordinarily therefore the Landlord would be at liberty to enforce the Notices in an ordinary suit and where appropriate by summary judgment.

S.6 however has an important proviso granting powers to the Tribunal to admit late references for sufficient cause in which case the Notices would not take effect. The only issue is whether the tenants have invoked that proviso.

It was an issue that was raised before the Trial Magistrate and one that he found triable enough to grant leave to the tenants to defend the suit.

In so doing he was well within his discretionary territory and an Appellate Court would be slow to interfere.

In order to satisfy myself on the point however, I called for Tribunal file No.323/92 where the Application in issue is said to have been filed in June 1992. There is indeed an application in that file which was drawn up and dated 2.6.1992. The Affidavit in support was sworn on 3.6.1992. Surprisingly however, it was not filed in the Coast Registry of the Tribunal until 11.8.1992 and was received in the Nairobi Registry on 16.9.92. S.6 of Cap.301 is invoked. Both parties recorded a consent order on 12.3.98 that the application would not be heard until the Appeals have been determined.

With respect that order compounds the issue and constitutes a vicious circle. That is because the issue raised in both courts is the same but the jurisdiction to determine it is bestowed on the Tribunal by law. The parties do not wish to proceed there awaiting another court to determine it, while that court awaits the Tribunal to determine it!

As I see it, the Tribunal has the jurisdiction to determine whether the application evidently placed on record, however irregularly, before it ought to be considered and whether it is in compliance with the proviso to S.6 of the Act. This court may have its views on that application but it is not seized of that matter. At least not yet. Unless the application is disposed of one way or the other it will remain as a straw on which the tenants will clutch on as a live issue. The learned Trial Magistrate was right on the facts placed before him to dismiss the application for summary judgment. That alone would be sufficient to dispose of the Appeal.

But I must advert to the misleading statements made by the tenants and their counsel about the filing of their application. In their defences, Affidavit in reply and in submissions of counsel in the court below and before this court, they have consistently given the impression that their application was already filed

by June 1992. In point of fact as confirmed from the Tribunal File No.323/92 it was only drawn but not filed. The statements must have been calculated either to mislead the court or to buy time. Either way they are despicable and do not speak well about the tenants' and their Advocate's honesty. This court must issue such orders as will express its displeasure at such conduct. Accordingly I make the following orders:-

(1) The Appeal is dismissed.

(2) The Respondents (Tenants) shall bear the costs of the Appeal and the Plaintiffs (Landlords) costs of the Application in the Lower Court.

Both costs shall be taxed if not agreed.

(3) The Respondents (Tenants) shall prosecute the Application filed before the Tribunal (No.323/92) within 30 days. To this end the file shall be returned forthwith to the Tribunal for fixing an early hearing date within that period.

Those are my orders.

Dated this 5th day of April, 2001.

P.N. WAKI

J U D G E

Now Mr. Njoroge says he is holding brief for Mr. Gikandi.

P.N. Waki, J.